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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, FEBRUARY 20, 2002

PETITION OF

GLOBAL NAPS SOUTH, INC.

CASE NO. PUC020001

For Arbitration Pursuant to
§ 252(b) of the Telecommunications
Act of 1996 to Establish an
Interconnection Agreement with
Verizon Virginia Inc.

PRELIMINARY ORDER

On January 4, 2002, Global NAPS South, Inc. ("GNAPS"), filed with the State Corporation Commission ("Commission") a Petition for arbitration of unresolved issues in its interconnection negotiations ("Arbitration Petition") with Verizon Virginia Inc. ("Verizon Virginia") pursuant to § 252(b) of the Telecommunications Act of 1996¹ and §§ 5-400-180 and 5-400-190 of Title 20 of the Virginia Administrative Code.² GNAPS requests that the Commission resolve its dispute with Verizon Virginia by (i) adopting an interconnection agreement between GNAPS and Verizon Virginia reflecting the undisputed contract language shown in Exhibit B to the Arbitration

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified* at 47 U.S.C. § 151 *et seq.* Hereinafter, all citations to the Telecommunications Act of 1996 will be to the ("1996 Act") or the ("Act") as codified in the United States Code.

² 20 VAC 5-400-190 was recodified at 20 VAC 5-419-10 et seq.

Petition; (ii) resolving the disputed issues on a "policy level;" and (iii) affirmatively ordering the parties to implement contract language embodying these policy decisions, including GNAPs' proposed language contained in Exhibit B to the Arbitration Petition.

On January 28, 2002, Verizon Virginia filed its Response to the Arbitration Petition of GNAPs and an alternative proposed interconnection agreement with GNAPs. Verizon Virginia asserts that GNAPs' Arbitration Petition is premature because it seeks "essentially an interim order 'resolving the disputed issues on a policy level' and sending the Parties back to the negotiation table." The Commission reserves judgment on GNAPs' request, consistent with our findings below.

GNAPs brings its Arbitration Petition pursuant to 47 U.S.C. §§ 251 and 252 and the effective rules implementing these provisions of the Act, issued by the Federal Communications Commission ("FCC") in its Local Competition Order.³ GNAPs also relies upon this Commission's Procedural Rules for Implementing §§ 251 and 252 of the Act (20 VAC 5-419-10 et seq.) and Rules Governing the Offering of Competitive Local Exchange Telephone Service (20 VAC 5-400-180). 20 VAC 5-400-180 F 6 provides for

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) hereinafter the "Local Competition Order."

our "arbitration" of contested interconnection matters.⁴ The Arbitration Petition recognizes that the Commission may choose to decline to exercise jurisdiction over this matter and instead refer it to the FCC. GNAPS states that it does not oppose such consideration of the Arbitration Petition by the FCC.

The Commission has declined to waive sovereign immunity under the Eleventh Amendment to the Constitution of the United States. We have avoided waiver of our immunity and explained our reasons in the Commission's *Order of Dismissal of the Application of AT&T Communications of Virginia, Inc., et al. For Arbitration with Verizon Virginia*, Case No. PUC000282, issued December 20, 2000, ("AT&T Dismissal Order"). We repeat below our holding in the AT&T Dismissal Order in which we declined to exercise jurisdiction.

As stated in our November 22, 2000, Order, until the issue of the Eleventh Amendment immunity from federal appeal under the Act is resolved by the Courts of the United States, we will not act solely under the Act's federally conveyed authority in matters that might arguably implicate a waiver of the Commonwealth's immunity, including the arbitration of rates, terms, and conditions of interconnection agreements

⁴ As discussed in our Order of June 15, 2000, in Case No. PUC990101, Petition of Cavalier Telephone, LLC, for arbitration of interconnection rates, terms, and conditions, and related relief, the Commission has authority under state law to order interconnection between carriers operating within the Commonwealth, and § 56-38 of the Code of Virginia authorizes us, upon request of the parties, "to effect, by mediation, the adjustment of claims, and the settlement of controversies, between public service companies, and their employees and patrons."

between local exchange carriers. (AT&T Dismissal Order, p. 2)

Because the United States Supreme Court is reviewing the issue of a state commission's waiver of sovereign immunity⁵ by participating in the Act's arbitration procedure, we will await the Supreme Court's decision before proceeding further to arbitrate under the Act.

The parties may elect to proceed with arbitration by the FCC under the Act in lieu of this Commission, or the parties may pursue resolution of unresolved issues pursuant to 20 VAC 5-400-180 F 6. If the parties wish to pursue this matter before the

⁵ See Mathias v. Worldcom Technologies, Inc., 00878 (Ruling below: Illinois Bell Telephone Company. v. Worldcom Technologies, Inc. (179 F. 3d 566 7th Cir. 1999)). The applicable issues under review include:

Does state commissions' acceptance of Congress's invitation to participate in implementing federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitute waiver of 11th Amendment immunity?
and

Can official capacity action seeking prospective relief against state public utility settlement for alleged ongoing violations of federal law in performing federal regulatory functions under the 1996 Telecommunications Act be maintained under Ex parte Young doctrine?

Also consolidated on appeal is Verizon Maryland, Inc. v. PSC of Maryland, 00-1531 (Ruling below: Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc. (240 F. 3d 279 (4th Cir. 2001))). The Supreme court will consider the following additional issue:

Does federal court have independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether state public utility commissions' action interpreting or enforcing interconnection agreement violates the 1996 Telecommunications Act?

Commission, the proceeding before us will be deemed to be requesting our action only under authority of Virginia law and our Rules.

Accordingly, IT IS ORDERED THAT:

(1) GNAPs and Verizon Virginia shall, within fifteen (15) days of the date of this Order, advise us in writing whether they wish to pursue arbitration before us consistent with the findings above.

(2) This case is continued for further order of the Commission.